NO. 48656-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KINGSA N. MCKNIGHT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable G. Helen Whitner, Judge

No. 14-1-02449-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant understand the requirement that assault in the first degree requires "force or means likely to produce great bodily harm" when the defendant admitted that he intended to inflict great bodily harm and caused an occipital skull fracture and brain injury to his three-year-old son? (Appellant's Assignment of Error 1)

2. Should this Court make a determination as to whether appellate costs are appropriate before the State seeks enforcement of costs if the State is to prevail on appeal? (Appellant's Assignment of Error 2)

B. STATEMENT OF THE CASE.

1. Procedural Facts

Kingsa Nigel McKnight, hereinafter "defendant," was charged with one count of homicide by abuse and one count of second degree murder resulting from the death of his three-year old son. CP 1-2. Both acts were domestic violence offenses and both crimes were aggravated by the defendant's position of trust and because the minor victim was particularly vulnerable. *Id.*

The defendant agreed to plead guilty to an amended information on one count of second degree murder and one count of first degree assault. CP 20-21. As part of the plea agreement the domestic violence enhancements were not included. *Id.*, 2RP 12-13[1]. The plea agreement

[1] The Verbatim Reports of Proceedings are contained in three consecutive volumes with new pagination for each volume. The VRPs will be referred to by the volume number.

also stated that the two charges were not the same criminal conduct and that both charges were serious offenses mandating consecutive sentences. CP 23-32, 2RP 5-6, 8-9.

In the plea agreement the defendant stated:

> Between January 1, 2014 and June 20, 2014 with the intent to inflict great bodily harm, I did assault T.G., my son, and he suffered an occipital skull fracture and brain injury and on... June 21, 2014 I did cause the death of T.G. while attempting to commit assault 1° (inflicts great bodily harm w/ [sic] requisite intent) all eventt [sp] occurring in Pierce Co., WA [sp].[2]

CP 23-32. Prior to accepting the guilty plea the trial court went through each element of the guilty plea and made sure that such was being made knowingly, intelligently, and voluntarily. 2RP 6-13. The court asked the defendant twice how he pleaded to each charge and each time the defendant pleaded guilty. 2RP 12-13. The trial court found that the defendant's plea was made knowingly, intelligently, and voluntarily. *Id.*, 2RP 13.

The defendant subsequently filed a motion to withdraw his guilty plea, claiming that defense counsel pressured him into taking the plea. CP 86-88, 89-90, 3RP 5. The sentencing court went through each question previously asked at the prior hearing regarding the defendant's guilty plea

[2] In the appellant's brief, counsel cites only to the statement related solely to Count I, to which no error is assigned. Brf. of App. 6. The above statement is the defendant's full statement as to Count I and Count II.

and the defendant agreed with the court on his previous answers. 3RP 6-8. The court then denied the defendant's motion. 3RP 8.

Standard range consecutive sentencing was imposed by the court totaling 343 months and imposing mandatory legal financial obligations. CP 73-85, 3RP 29. The defendant filed a timely appeal. CP 92-105.

2. Substantive Facts

The defendant and Bianca Green were T.G.'s (victim) biological parents. CP 8-17. The defendant was not involved in the victim's life for the first three years. *Id.* In January 2014, when Ms. Green and T.G. returned to the State of Washington the defendant became the primary caregiver for T.G. while Ms. Green was working. *Id.*

Between January 1, 2014 and June 21, 2014, the defendant committed multiple assaults against T.G. *Id.* The assaults seem to have occurred as a result of T.G. having trouble with potty-training. *Id.*, 3RP 23. Over the course of the six months between January 1, 2014 and June 21, 2014 the defendant's girlfriend, Kalimah Hunt-Fletcher, saw scratches and a bruise across T.G.'s chest, neck, and stomach, bruises and red marks on T.G.'s back near his shoulder blades. Additionally, Hunt-Fletcher saw a red mark and raised swelling on T.G.'s forehead, and a broken blood vessel. CP 8-17. Each time the defendant had an excuse for why this occurred. *Id.*

During this same period, Ms. Green and her brother noticed that T.G. had bruises and marks after periods of time that he had been with the defendant. *Id.* This included an instance when T.G. needed to have stiches to his lip while in the defendant's care. *Id.*

On June 13, 2014, the defendant took T.G. to urgent care. CP 3-4. Urgent care advised the defendant to take T.G. to the emergency room immediately as a higher level of care was needed than what urgent care could provide. *Id.* The defendant did not do so. *Id.*

On June 21, 2014 the defendant found T.G. on the floor next to his bed, covered in vomit, and non-responsive. *Id.* The defendant claimed that he attempted to perform CPR on T.G. *Id.* The defendant's phone records indicate that on June 21st he researched how to revive someone who had been choked, how to revive someone who was unconscious, and how to revive someone who had been knocked out. CP 8-17. After researching, the defendant did not call 911, but rather drove T.G. to Mary Bridge Children's Hospital. CP 3-4. The defendant parked his car in the parking lot and carried T.G. to the ER. *Id.* Once there, medical personnel performed 12 rounds of CPR and determined that T.G. was exhibiting signs of pre-death breathing. *Id.*

Doctor Yolanda Duralde determined that T.G. exhibited areas of subdural hemorrhage and an acute skull fracture as a result of inflicted trauma. *Id.* Dr. Duralde determined that the injury had occurred 3-4 hours prior to arriving at the hospital. *Id.* T.G. also had swelling and a bruise in

the middle of his forehead, a scabbed abrasion and bruising to his left temple, a small bruise around the mid-chest, a round bruise located over his spine on the mid-back near the shoulder blades, and a scabbed abrasion approximately 3-4 inches long on his lower back. *Id.*

T.G. died on June 23, 2014 as a result of his injuries. *Id.*

C. ARGUMENT.

1. THIS COURT SHOULD UPHOLD THE DEFENDANT'S GUILTY PLEA AS THE DEFENDANT UNDERSTOOD THE NATURE OF THE FIRST DEGREE ASSAULT CHARGE AND THERE WAS NO MANIFEST INJUSTICE[3].

Superior Court Criminal Rules (CrR) provide a court will not accept a plea of guilty unless the court is first able to determine that the defendant made such voluntarily, competently, and with the understanding of the nature of the charge and consequence of the plea. CrR 4.2(d).

The State bears the burden of proving the validity of a guilty plea, while the defendant has the burden of proving manifest injustice. ***State v. Knotek***, 136 Wn. App. 412, 423, 149 P.3d 676 (2006). A trial court's decision on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. ***State v. S.M***, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

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[3] Defendant only challenges that he did not understand the nature of the charge as it relates to Count II, First Degree Assault. Brf. of App. 3, 5. As such, this Court should limit its review to Count II.

a. The defendant understood the nature of the charges to which he pled[4].

Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. ***State v. Weydrich***, 163 Wn.2d 554, 556, 182 P.3d 965 (2008). A guilty plea is voluntary if the defendant possesses an understanding of the law in relation to the facts. ***In re Personal Restraint Petition of Keane***, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting ***McCarthy v. United States***, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). A defendant must be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime. ***State v. Smith***, 74 Wn. App. 844, 848, 875 P.2d 1249 (1994) (quoting ***State v. Osborne***, 102 Wn.2d 87, 93, 684 P.2d 683 (1984)). The requisite state of mind required for assault in the first degree is intent to inflict great bodily harm. RCW 9A.36.011(1). The written statements of the defendant and charging document may be considered when determining if the defendant was informed of the nature of the charge. ***Smith***, 74 Wn. App. at 849.

The factual issue in this case is similar to the factual issue in ***Smith***, 74 Wn. App. 844, and ***Osborne***, 102 Wn.2d 87. In both ***Smith*** and ***Osborne***, one of the issues was whether or not the defendant understood

[4] In the defendant's motion of withdrawal of guilty plea before the trial court defendant argued ineffective assistance of counsel. CP 86-88. However, the defendant does not argue such on appeal and as such, will not be addressed in respondent's brief. Defendant also does not challenge the court's ruling denying his motion to withdraw the plea.

the underlying charge and requirements for second degree assault. In ***Osborne***, the court found that the:

> [Defendants] were made aware... that knowledge was a necessary element of the crime for which they were charged. At the plea hearing, the prosecutor read the information to the petitioners. The information alleged:
>
> > That the defendants ... during a period of time intervening between November 13 and December 9, 1981, while *committing and attempting to commit the crime of assault* in the second degree, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death on or about December 9, 1981, of Shelly L. Everett ...
>
> (Italics in original.) It is clear from this language that some sort of knowing, purposeful conduct is contemplated. The word "assault" is not commonly understood as referring to an unknowing or accidental act. Likewise, it is difficult to imagine anyone "attempting to commit" an act unknowingly.

Osborne, 102 Wn.2d at 94. Hence, the court found that based on the language of the information, that the defendants were made sufficiently aware of the nature of the charges against them. *Id.*

In ***Smith***, the trial court read that defendant's description of the offense that included the portion that would have constituted assault. ***Smith***, 74 Wn. App. at 850. Smith stated that the statement read by the court was an accurate statement. *Id.* This Court held, that based on the

description of the conduct, Smith understood the nature of the assault charge. *Id.*

In the present case, there are clear similarities between the second amended information that the defendant pled to and the information in ***Osborne***, as well as the defendant's description of his assaults on T.G. The second amended information that the defendant pleaded to states that the defendant

> ...did unlawfully and feloniously, *while committing or attempting to commit* the felony crime of Assault in the First Degree...did cause the death of T.G... [and] did unlawfully and feloniously, *with intent to inflict great bodily harm*, intentionally assault T.G. (emphasis added).

CP 20-21. This illustrates, that similar to the situation in ***Osborne***, the defendant knew that the charge for second degree murder was the result of an assault and that assault was done intentionally to inflict harm on T.G.

In the defendant's guilty plea he stated that

> "Between January 1, 2014 and June 20, 2014 with the intent to inflict great bodily harm, I did assault T.G., my son, and he suffered an occipital skull fracture and brain injury."

CP 23-32. Paragraph 11 of the Statement of Defendant on Plea of Guilty contains a handwritten statement regarding the defendant's admission of guilt, including the above section. *Id.* On the side of the handwritten statement are the defendant's initials. *Id.* Towards the end of the colloquy

regarding the guilty plea, the trial court specifically asked the defendant if the initials were his, to which the defendant answered "yes." 2RP 11-12. The court then asked the defendant if the initials indicated that the defendant was adopting the statement as his own to both offenses and again, the defendant answered "yes." 2RP 12.

This is very similar to ***Smith***, 74 Wn. App. 844, where this Court held that because the description of the crimes committed contained the description of the necessary conduct to commit the crime and the defendant admitted that the statements were accurate, such was enough for the guilty plea to stand as it demonstrated that Smith understood the nature of the assault charges. ***Smith***, 74 Wn. App. at 850. Here, the defendant initialed a handwritten statement and stated that he was adopting such as his own. 2RP 11-12. The statement provided the actions that the defendant undertook to commit the crime of assault in the first degree. CP 23-32. Specifically, the defendant stated that he had intended to inflict great bodily harm, an element of assault in the first degree, on his son and that he had done so by causing an occipital skull fracture and a brain injury. *Id.* This demonstrates that the defendant had full knowledge and understanding of the charges to which he was pleading guilty. As such, because the defendant understood the nature of the charges, this Court should uphold the defendant's guilty plea.

b. There was no manifest injustice in the trial court accepting the defendant's guilty plea.

A court will allow a defendant to withdraw a guilty plea when such is necessary to correct a "manifest injustice." CrR 4.2(f). Manifest injustice is injustice that is obvious, directly observable, overt, and not obscure. ***State v. Knotek***, 136 Wn. App. 412, 423, 149 P.3d 676 (2006). The four indicia of manifest injustice are (1) denial of effective assistance of counsel; (2) failure of the defendant or one authorized by him to do so to ratify the plea; (3) involuntary plea: and (4) violation of plea agreement by the prosecution. ***State v. Taylor***, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). In this case, the only indicia of manifest justice that the defendant is claiming is an involuntary plea. Brf. of App. at 7.

When a defendant fills out a written statement on a guilty plea and acknowledges that they have read and understood such, and that its contents are accurate, the written statement provides prima facie verification of the plea's voluntariness. ***State v. Perez***, 33 Wn. App.2d 268, 261, 654 P.2d 708 (1982). When a judge then orally inquires of the defendant and satisfies himself on the record of the existence of the criteria necessary for a showing of voluntariness, the presumption of voluntariness is well nigh irrefutable. *Id.* at 622.

As previously mentioned, in this case, paragraph 11 of the Statement of Defendant on Plea of Guilty contained the defendant's handwritten statement on the conduct that caused the defendant to be guilty of the crimes charged. CP 23-32. The trial court specifically asked if the defendant had placed his initials by the handwritten statement to adopt such as his own and that the statement was "what you [defendant] did that makes you guilty of both offenses?" to which the defendant replied, "yes." 2RP 12. This illustrates that the defendant was admitting to the accuracy of the contents of the statement as well as that he had filled out the written statement on his plea of guilty.

Further, the court asked the defendant if he had read over the guilty plea and discussed such with his attorney. *Id.* at 6-7. The defendant stated that he had. *Id.* The court then went through each portion of the guilty plea and asked if the defendant understood each individual portion and the defendant stated that he had. *Id.* at 6-12. The court also specifically asked if the plea was being made freely and voluntarily, and the defendant replied in the affirmative. *Id.* at 11. All of this demonstrates that the defendant filled out a written statement on a guilty plea, read and understood such, and acknowledged that its contents were accurate. As such, under ***Perez***, there is prima facie evidence of the plea's voluntariness

and the presumption of such is irrefutable due to the trial court orally inquiring about the voluntariness of the plea.

2. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGEMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000).

In ***Nolan***, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in ***Blank***, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in ***State v. Sinclair***, 192 Wn. App. 380, 389-390, 367 P. 3d 612 (2016), prematurely raises an issue that is not before the Court. *If* the defendant does not prevail; and *if* the State files a cost bill; the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

> A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant argues that the Court should not impose costs on indigent defendants. App. Brf. at 9. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, RCW 10.01.160(2). In ***State v. Barklind***, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed

counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In ***Blank***, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

In ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As ***Blazina*** instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, ***Blazina*** does not apply to appellate costs. As ***Sinclair*** points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. Instead, it provided

that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In ***Blank***, *supra*, at 242, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as much as 12%. *Id.* RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

> (2) The court may, on motion by the offender, following the offender's *release from total confinement*, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090 (emphasis added). The rest of the "relief" is equally limited and demonstrative of the Legislature's intent and presumption that the debts be paid:

> (a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family*;
> (b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;
> (c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period,* excluding any payments mandatorily deducted by the department of corrections;
> (d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations*. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2) (emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

The unfortunate fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

Parties and the courts can criticize this legislation, its purpose and result, and that the debts accumulated by indigent defendants under RCW 10.73.160(3) (and 10.01.160) and the interest that accrues on it under RCW 10.82.090 and RCW 4.56.110 are onerous. The parties may even be in agreement in their criticism. In ***Blazina,*** the Supreme Court was likewise critical of these statutes and their result. *See* 182 Wn.2d at 835-836. Yet, the Court did *not* find the statutes illegal or unconstitutional.

The question for this Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in ***Blank***, and what the Court did *not* do in ***Blazina***. It is for the Legislature to change the statute if it so desires.

D. CONCLUSION.

The defendant understood the charges to which he was pleading and as such, no manifest injustice occurred. Additionally, the Court should address the issue of appellate costs only if the State prevails and seeks enforcement. For the foregoing reasons, this Court should affirm the trial court's finding that the guilty plea was made knowingly, voluntarily, and intelligently

DATED: August 24, 2016.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.25.16
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PIERCE COUNTY PROSECUTOR

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